Supreme Court, U.S.
FILED
SEP 26 2001

(7)

No. 00-1406

In the Supreme Court of the United States

CHEVRON U.S.A., INC., PETITIONER

v.

MARIO ECHAZABAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, permits an employer to refuse to hire an individual because his performance of the job will, as a result of his disability, pose a direct threat to his own health or safety.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, prohibits an employer from discriminating against a "qualified individual with a disability." 42 U.S.C. 12112(a). A "qualified individual with a disability" is a disabled individual "who, with or without reasonable accommodation, can perform the essential functions of the employment position." 42 U.S.C. 12111(8). The ADA defines "discriminate" to include "using qualification standards, employment tests or other selection criteria that screen

out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity." 42 U.S.C. 12112(b)(6).

A section entitled "Defenses" clarifies that "[i]t may be a defense to a charge of discrimination under [the ADA] that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation." 42 U.S.C. 12113(a). That section specifically provides that the "term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. 12113(b). The ADA defines "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. 12111(3).

The ADA requires the Equal Employment Opportunity Commission (EEOC) to issue regulations to carry out the provisions of Title I, 42 U.S.C. 12116, and the EEOC, following public notice and comment, has issued regulations pursuant to that mandate, 56 Fed. Reg. 35,726 (1991). Consistent with the statutory text, the regulations provide that an employer may defend against a charge that a qualification standard improperly screens out disabled individuals by showing that the standard is "job-related and consistent with business necessity, and such performance cannot be accomplished with reasonable accommodation." 29 C.F.R. 1630.15(b)(1). In elaborating on that defense, the regulations state that "[t]he term 'qualification standard' may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace." 29 C.F.R. 1630.15(b)(2). Accordingly, the regulations define direct threat to mean "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. 1630.2(r).

2. From 1972 until 1996, respondent Mario Echazabal worked at an oil refinery owned by petitioner Chevron U.S.A., Inc., as an employee of various maintenance contractors. In 1992, respondent applied to work directly for petitioner in the refinery's coker unit. Petitioner made respondent an offer of employment contingent upon his passing a physical examination. The examination revealed that respondent's liver was releasing certain enzymes at a higher than normal level. Based on that examination, petitioner concluded that respondent's liver might be damaged by exposure to the solvents and chemicals present in the coker unit. Petitioner therefore rescinded the job offer. Pet. App. 2a.

After learning of the enzyme test results, respondent consulted several doctors. He was eventually diagnosed with asymptomatic, chronic active Hepatitis C, a viral infection of the liver. Pet. App. 3a, 35a. Respondent continued to work throughout the refinery (including in the coker unit) as an employee of petitioner's maintenance contractor. *Id.* at 2a.

In 1995, respondent again applied to petitioner for a position in the coker unit. Petitioner again made respondent an offer contingent on a physical examination. Pet. App. 3a. The examining physician concluded that

further exposure to hepatotoxic chemicals and solvents like those used in the coker unit would seriously endanger respondent's health and, in certain circumstances, could be fatal. *Id.* at 38a; C.A. App. 81-82. Petitioner's medical director agreed that respondent could not work in the coker unit without risk to his own health. Pet. App. 38a. Based on the doctors' findings, petitioner refused to hire respondent. *Id.* at 3a. Petitioner also instructed its maintenance contractor to ensure that respondent was not exposed to solvents and chemicals; and, as a result, respondent could no longer work at the refinery. *Ibid.*

3. a. Respondent then brought this action in state court alleging, among other things, that petitioner and its maintenance contractor had discriminated against him on the basis of a disability, in violation of the ADA. Pet. App. 3a. Petitioner removed the case to the United States District Court for the Central District of California. *Id.* at 33a. The district court granted summary judgment in favor of petitioner on all of respondent's claims. *Id.* at 32a-57a. On the ADA claim, the district court found that petitioner's refusal to hire respondent was lawful because, as a result of respondent's liver condition, his working in the refinery would have posed a direct threat to his health. *Id.* at 46a-52a. The district court stayed the proceedings against the maintenance contractor, and certified several issues for appeal, including the propriety of the grant of summary judgment on the ADA claim. *Id.* at 3a-4a.[1]

[1] In the district court, respondent presented medical evidence that the court described as "raising a genuine issue that despite elevated liver enzyme levels, [respondent]'s liver function was normal, and that the substances to which he would be exposed in the position [in the coker unit] posed no greater a danger to [respondent] than to other workers." Pet. App. 48a. The district court discounted that evidence, however, because the evaluations on which it was based were not performed until after the alleged discrimination. *Ibid.* The EEOC filed an amicus brief in the court of appeals in which the EEOC argued that the district court erred, but the court of appeals did not reach that issue, and it is not presented by the petition for a writ of certiorari.

b. The United States Court of Appeals for the Ninth Circuit reversed. Pet. App. 1a-18a. The court first held that the ADA does not provide an affirmative defense permitting an employer "to refuse to hire an applicant on the ground that the individual, while posing no threat to the health or safety of other individuals in the workplace, poses a direct threat to his own health or safety." *Id.* at 5a. The court found the language of the ADA "dispositive" of that question. *Id.* at 6a. The court noted that the statutory language provides that an employer may impose, as a qualification standard, a "requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." *Ibid.* (quoting, in part, 42 U.S.C. 12113(b)). Relying on the maxim of statutory construction *expressio unius est exclusio alterius*, the court reasoned that, "by specifying only threats to 'other individuals in the workplace,' the statute makes it clear that threats to other persons—including the disabled individual himself—are not included within the scope of the defense." *Id.* at 6a-7a. The court also found support in the ADA's definition of "direct threat" to mean "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." *Id.* at 7a (quoting 42 U.S.C. 12111(3)).

The court further concluded that the ADA's legislative history reinforces that the direct threat defense excludes threats to oneself. Pet. App. 7a. The court noted that the legislative history contains numerous

references to "direct threat" in relation to others, but the term "direct threat" is never "accompanied by a reference to threats to the disabled person himself." *Id.* at 7a-8a. The court also relied on a floor statement by Senator Kennedy that "employers may not deny a person an employment opportunity based on paternalistic concerns regarding the person's health." *Id.* at 8a (quoting 136 Cong. Rec. 17,377 (1990)). The court acknowledged that a discussion in a House of Representatives Committee Report supports the existence of a defense based on a threat to the employee's own health, but the court concluded that the discussion was "somewhat ambiguous" and "outweighed by the substantial evidence to the contrary" elsewhere in the legislative history. *Id.* at 9a n.6.

In reaching its conclusion, the court invalidated the EEOC's regulations providing that an employer may establish as a "'qualification standard' * * * a requirement that an individual shall not pose a direct threat to the health or safety of *the individual* or others in the workplace." 29 C.F.R. 1630.15(b)(2) (emphasis added); see also 29 C.F.R. 1630.2(r). The court analyzed the regulations under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984), Pet. App. 11a-12a & n.8, but found them "contrary" to the ADA's text. In the court's view, "the language of the direct threat defense plainly expresses Congress's intent to include within the scope of [the] defense only threats to other individuals in the workplace." *Id.* at 12a.

The court acknowledged that its conclusion conflicts with the decision of the United States Court of Appeals for the Eleventh Circuit in *Moses* v. *American Nonwovens, Inc.*, 97 F.3d 446, 447 (1996) (per curiam), cert. denied, 519 U.S. 1118 (1997). Pet. App. 6a. The court

also noted that its decision is inconsistent with dicta in three other circuit court decisions. *Ibid.* (citing *LaChance* v. *Duffy's Draft House, Inc.*, 146 F.3d 832 (11th Cir. 1998); *EEOC* v. *Amego, Inc.*, 110 F.3d 135 (1st Cir. 1997); *Daugherty* v. *City of El Paso*, 56 F.3d 695 (5th Cir. 1995), cert. denied, 516 U.S. 1172 (1996)).

The court of appeals next addressed petitioner's contention that, "even if the direct threat provision does not provide it with a defense to its actions," respondent, "because of the risk of damage to his liver, * * * is not 'otherwise qualified' to perform the job at issue." Pet. App. 14a. The court acknowledged that an individual who, because of his disability, is unable to perform the "essential functions of the employment position that such individual holds or desires" (42 U.S.C. 12111(8)) is not a "qualified individual" (42 U.S.C. 12112(a)) under the ADA and, therefore, is not protected by the statute. Pet. App. 14a. In this case, however, the court explained, there is no evidence "that the risk [respondent] allegedly poses to his own health renders him unable to perform [the job] duties." *Id.* at 17a. Rather, the evidence shows that respondent had successfully performed work in the coker unit for years. "Had [he] failed during that period to perform the essential functions of his work, we seriously doubt that [petitioner] would have twice extended him contingent offers to work at the coker unit." *Id.* at 18a. The court concluded that whatever risk respondent's "employment might pose to his own health" in the future, it "does not affect the question whether he is a 'qualified individual with [a] disability.'" *Ibid.*

Judge Trott dissented, calling the majority's decision a "Pickwickian ruling" that "leads to absurd results." Pet. App. 23a. Judge Trott both disagreed with the majority's conclusion that respondent is a "qualified

individual" and noted that "[petitioner] has a defense to this action, known as the 'direct threat' defense." *Id.* at 22a. He stressed that the "EEOC's implementing regulations, authorized by Congress, define[] a 'direct threat' to mean 'a significant risk of substantial harm to the health or safety of the individual * * * that cannot be reduced by reasonable accommodation.'" *Ibid.* (quoting 29 C.F.R. 1630.2(r)). Judge Trott would have deferred to the EEOC's regulations because "the EEOC has rationally and humanely spoken." *Ibid.*

DISCUSSION

This Court should grant the petition for a writ of certiorari. The court of appeals incorrectly held that the ADA forecloses the affirmative defense that a disabled individual's performance of the job would pose a significant risk of substantial harm to his own health or safety. In so doing, the court erroneously invalidated EEOC regulations that recognize that defense and created a conflict with the decision of the Eleventh Circuit in *Moses* v. *American Nonwovens, Inc.*, 97 F.3d 446 (1996) (per curiam), cert. denied, 519 U.S. 1118 (1997). The issue is an important one, and its resolution by this Court is warranted.

I. THE COURT OF APPEALS ERRED IN INVALIDATING THE EEOC'S REGULATIONS

A. The EEOC's Threat-To-Self Regulations Are Consistent With The Text Of The ADA

Title I of the ADA prohibits an employer from "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities *unless* the standard, test or other selection criteria, as used by the covered entity, is

shown to be job-related for the position in question and is consistent with business necessity." 42 U.S.C. 12112(b)(6) (emphasis added). The statute clarifies that "[i]t may be a defense to a charge of discrimination" if a challenged qualification standard or criterion "has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation." 42 U.S.C. 12113(a). The ADA specifies that the "term 'qualification standards' may *include* a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace," 42 U.S.C. 12113(b) (emphasis added), and defines "direct threat" in parallel terms, see 42 U.S.C. 12111(3).

The EEOC has interpreted those provisions to permit an employer to impose a qualification standard that screens out not only individuals who pose a direct threat to the health or safety of other individuals in the workplace but also individuals who pose such a threat to their own health or safety. Specifically, the EEOC has issued a regulation that provides that "[t]he term 'qualification standard' may include a requirement that an individual shall not pose a direct threat to the health or safety of *the individual* or others in the workplace." 29 C.F.R. 1630.15(b)(2) (emphasis added). Another EEOC regulation defines "direct threat" as a "significant risk of substantial harm to the health or safety of *the individual* or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. 1630.2(r) (emphasis added).

The EEOC promulgated those regulations through notice-and-comment rulemaking, see 56 Fed. Reg. 35,726 (1991), pursuant to an express delegation of authority to promulgate regulations to "carry out" the

provisions of Title I of the ADA. 42 U.S.C. 12116. The EEOC's regulatory interpretation is therefore entitled to deference in accordance with *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984).

"[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States* v. *Mead Corp.*, 121 S. Ct. 2164, 2171 (2001). It is "fair to assume" that "Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure," such as the notice-and-comment rulemaking that the EEOC undertook in this case. *Id.* at 2172-2173. Compare *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 479 (1999) (reserving the question whether the EEOC's regulation interpreting the term "disability" is entitled to *Chevron* deference because that term is defined in statutory provisions over which the EEOC has not been delegated rulemaking authority).

Because the EEOC's regulations interpret provisions over which the ADA expressly grants the EEOC rulemaking authority, the court of appeals was "obliged to accept the [EEOC]'s position if Congress has not previously spoken to the point at issue and the [EEOC]'s interpretation is reasonable." *Mead*, 121 S. Ct. at 2172 (citing *Chevron*, 467 U.S. at 842-845). The court, however, concluded that the EEOC's position is contrary to the clear intent of Congress. That conclusion was incorrect.

The ADA sets forth a general defense for "qualification standards" or "other selection criteria" that are

"job-related and consistent with business necessity." 42 U.S.C. 12113(a); see also 42 U.S.C. 12112(b)(6) (excluding such standards and criteria from the definition of discrimination). The statute specifies that such qualification standards "may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. 12113(b). It does not state that this requirement is the only permissible qualification standard concerning workplace threats to health or safety. To the contrary, it provides a general defense for job-related qualification standards and selection criteria that are consistent with business necessity, and it employs words of inclusion ("may include") when specifying a threat to others as an example of a permissible qualification standard. Nothing in the ADA forecloses a qualification standard or selection criterion that requires that an individual not pose a threat to his own health or safety. Under those circumstances, Congress has not "directly spoken to the precise question" whether an employer may require as a qualification standard that a prospective employee be able to perform the job he seeks without posing a threat to his own health or safety. *Chevron*, 467 U.S. at 842.

B. The Court Of Appeals' Reliance On The *Expressio Unius* Canon Was Erroneous

The court of appeals reached a contrary conclusion because of its mistaken reliance on the canon of statutory construction *expressio unius est exclusio alterius*. The court reasoned that the statutory specification of a "direct threat" defense for the risk of harm to others implicitly precludes a direct threat defense for the risk of harm to self. See Pet. App. 6a-7a.

That reasoning is flawed. The court of appeals' reliance on the *expressio unius* principle was inappropriate because the relevant statutory language is expressly inclusive. As noted above, the threat-to-others defense is included in the section of the ADA that sets forth a more general defense for qualifications standards that are "job-related and consistent with business necessity." 42 U.S.C. 12113(a). The statutory language specifies one example of that defense—"'qualification standards' may *include* a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. 12113(b) (emphasis added). The use of the term "include" indicates that what follows is illustrative rather than exclusive. See *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) (explaining that "the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle"); 2A Norman J. Singer, *Statutes and Statutory Construction* § 47.07, at 231 (6th ed. 2000); see, *e.g.*, *Pfizer Inc.* v. *Government of India*, 434 U.S. 308, 312 n.9 (1978); *United States* v. *New York Tel. Co.*, 434 U.S. 159, 169 (1977).[2]

This Court has frequently cautioned against that kind of uncritical reliance on the *expressio unius* principle. See *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 703 (1991); *Burns* v. *United States*, 501 U.S. 129, 136

[2] The ADA's definition of "direct threat" to mean "a significant risk to the health or safety of others," 42 U.S.C. 12111(3), does not preclude the EEOC from using that term to describe another, similar example of the business necessity defense—a requirement that an employee's performance of the job not pose a significant risk to the health or safety of the employee himself. The statutory definition of "direct threat" simply defines that term as it is used in the statute.

(1991); *Ford* v. *United States*, 273 U.S. 593, 612 (1927). Moreover, courts have noted that the canon is "an especially feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved." *Cheney R.R.* v. *ICC*, 902 F.2d 66, 69 (D.C. Cir.), cert. denied, 498 U.S. 985 (1990). Because it relies on an inference rather than a direct statement, the canon "can rarely if ever be the 'direct[]' congressional answer required by *Chevron*." *Ibid.* See also *Martini* v. *Federal Nat'l Mortgage Ass'n*, 178 F.3d 1336, 1343 (D.C. Cir. 1999) (*expressio unius* maxim "is simply too thin a reed to support the conclusion that Congress has clearly resolved [the] issue"), cert. dismissed, 528 U.S. 1147 (2000).

The legislative history of the ADA likewise does not indicate an intent to limit the business necessity defense to health and safety threats to others in the workplace. The Ninth Circuit concluded otherwise because, when the term "direct threat" was used in the "various committee reports" and "floor debate," there was no explicit reference to "threats to the disabled person himself." Pet. App. 7a-8a. That reasoning applies to the legislative history the same erroneous *expressio unius* analysis that the court of appeals applied to the statutory language. As discussed above, that principle is not applicable here. Indeed, it is particularly inappropriate to apply the *expressio unius* canon to the legislative history, since "the language of a statute * * * is not to be regarded as modified by examples set forth in the legislative history." *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 649 (1990). Further, although the legislative history relevant to the threat-to-self defense is mixed, see 136 Cong. Rec. 17,377 (1990) (Sen. Kennedy), there is, as

the court of appeals acknowledged (Pet. App. 9a n.6), legislative history that supports its recognition, H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 73-74 (1990).

C. The EEOC's Threat-To-Self Regulations Are A Reasonable Interpretation Of The ADA

The EEOC's regulations reflect a reasonable interpretation of the ADA entitled to *Chevron* deference. Although the "direct threat" provision of the ADA does not itself provide a defense when the employee's job performance poses a threat to the employee himself, the EEOC reasonably concluded that the general business necessity defense is broad enough to include a threat-to-self defense. See 29 C.F.R. Pt. 1630 App. § 1630.15(b) (noting that employers with qualification standards based upon safety must satisfy the direct threat standard "in order to show that the requirement is job-related and consistent with business necessity").

As noted above, the ADA provides a general defense for qualification standards or other selection criteria that are job-related and consistent with business necessity. The "direct threat" provision is illustrative of that general defense and does not exclude other potential applications. A qualification standard that screens out disabled individuals who pose a threat to their own health or safety fits comfortably within the general defense. Like the congressionally-specified defense for standards that screen out those who pose a threat to the health or safety of others, it is job-related and consistent with business necessity.

When there is a high probability that an employee will suffer serious injury or death in the near future because of his performance of the job, there is a significant risk that the employee will not be able to

perform the essential functions of the job on an ongoing basis. If the employee becomes unable to perform the job, the employer will likely incur considerable costs due to interruption of business operations and the need to find a replacement. Furthermore, serious injuries and deaths pose the potential for unique disruptions in the workplace and unique costs to employers.

In addition, as the EEOC noted when it promulgated its regulations, 56 Fed. Reg. at 35,745, including harm to the disabled individual within the general business necessity defense is consistent with judicial precedent under the Rehabilitation Act of 1973, 29 U.S.C. 791-794 (1994 & Supp. V 1999), as well as the EEOC's regulations interpreting that provision. See Pet. 18-20 (collecting cases and also citing EEOC regulations); Pet. App. 16a n.10 (citing *Mantolete* v. *Bolger*, 767 F.2d 1416, 1422-1424, amended by 38 Fair Empl. Prac. Cas. (BNA) 1517 (9th Cir. 1985)). Because the ADA is modeled on the Rehabilitation Act, it was reasonable for the EEOC to incorporate prior practice under the Rehabilitation Act into its ADA regulations. See *Bragdon* v. *Abbott*, 524 U.S. 624, 631-632, 645 (1998); see also 42 U.S.C. 12201 (incorporating Rehabilitation Act standards into the ADA "[e]xcept as otherwise provided").

Finally, at the same time that the EEOC's approach accommodates legitimate business concerns, it also protects disabled employees from "over-protective rules and policies" (42 U.S.C. 12101(a)(5)) based on "stereotypic assumptions" (42 U.S.C. 12101(a)(7)). Under the threat-to-self regulations adopted by the EEOC, employers do not (as the court of appeals feared) have license to "deny a person an employment opportunity based on paternalistic concerns regarding

the person's health." Pet. App. 8a (quoting 136 Cong. Rec. at 17,377 (Sen. Kennedy)). The EEOC's regulations apply to the threat-to-self defense the demanding direct threat standard that applies to the threat-to-others defense. That standard protects against abuse of the defense by requiring the employer to prove "significant risk of substantial harm to the health or safety of the individual or others," based "on an individualized assessment of the individual's present ability to safely perform the essential functions of the job." 29 C.F.R. 1630.2(r). In addition, by analyzing employer concerns about threat to self as a defense (rather than part of the employee's prima facie demonstration that he or she is "qualified" under 42 U.S.C. 12112(a)), the regulations appropriately place the burden of proof on employers. The EEOC's regulations are thus eminently reasonable, and the court of appeals erred in invalidating them.

II. THE COURT OF APPEALS' DECISION WARRANTS THIS COURT'S REVIEW

This Court should grant the petition for a writ of certiorari and reverse the erroneous decision of the Ninth Circuit. That decision has created a conflict among the courts of appeals. As the Ninth Circuit acknowledged, Pet. App. 6a, its decision cannot be reconciled with the decision of the Eleventh Circuit in *Moses* v. *American Nonwovens, Inc.*, 97 F.3d 446 (1996) (per curiam), cert. denied, 519 U.S. 1118 (1997). In *Moses*, the court of appeals held that an employer did not violate the ADA by terminating an employee with epilepsy because the risks to "his own health or safety" satisfied the "direct threat" defense. *Id.* at 447. Citing both the general business necessity and direct threat subsections of the ADA, the court stated: "An employer may fire a disabled employee if the disability renders the employee a 'direct threat' to his own health or safety." *Ibid.* Although the Eleventh Circuit did not explicitly address the validity of the EEOC's regulations, the court cited one of those regulations with approval. See *ibid.* (citing 29 C.F.R. 1630.2(r)).[3]

This Court's review is also warranted because the Ninth Circuit's decision invalidates the EEOC's regulations. As a result, employers who operate nationwide must modify their employment practices in the Ninth Circuit even though they follow EEOC regulations in other parts of the country. For the EEOC, the Ninth Circuit's ruling means that different field offices will process discrimination complaints under different legal standards. Offices outside the Ninth Circuit will apply the threat-to-self regulations; offices that serve areas entirely within the Ninth Circuit will not, and offices that serve areas both inside and outside the Ninth Circuit will need to apply different standards in different cases. The ADA's anti-discrimination provisions should not apply in this haphazard fashion; clear and consistent standards should govern nationwide.

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[3] The Ninth Circuit's holding in this case is also inconsistent with statements in decisions of other courts of appeals that assume the existence of a threat-to-self defense. See Pet. App. 6a (citing cases); see also *Borgialli* v. *Thunder Basin Coal Co.*, 235 F.3d 1284, 1291 (10th Cir. 2000) (citing with approval EEOC's regulations). Moreover, although the Ninth Circuit correctly held that respondent is a "qualified individual" under 42 U.S.C. 12112(a), that aspect of the court's decision is in tension with the Seventh Circuit's decision in *Koshinski* v. *Decatur Foundry, Inc.*, 177 F.3d 599 (1999). In that case, the Seventh Circuit held that the plaintiff was not qualified because "there was no way to do the job [that he had previously held] without subjecting himself to the very things his doctors recommended he stay away from." *Id.* at 603.

Finally, the issue of threat to self arises with sufficient frequency that it merits this Court's attention. In addition to the cases involving private employers noted in the petition, the federal government has encountered numerous cases involving threats to the health or safety of applicants or employees. In *McClaren* v. *Dalton*, Appeal No. 01960820, 1997 WL 774840, at *3 (EEOC Dec. 5, 1997), for instance, the EEOC ruled that the Department of the Navy lawfully precluded an employee with multiple sclerosis from working aboard ships because the work would have posed a direct threat of substantial harm to the employee's health and safety. In another case, the EEOC sustained the Postal Service's refusal to allow an employee to continue his previous work as a window clerk because that continued employment would have posed a threat to his health and possibly required amputation of his foot. *Haug* v. *Runyon*, Appeal No. 01951337, 1998 WL 25247, at *8 (EEOC Jan. 9, 1998). See also *Burkett* v. *United States Postal Serv.*, 175 F.R.D. 220 (N.D. W.Va. 1997); *Merrell* v. *Pirie*, Appeal No. 01971565, 2001 WL 237043, at *4 (EEOC Mar. 2, 2001); *Patterson* v. *Summers*, Appeal No. 01964964, 2000 WL 366113 (EEOC Apr. 3, 2000); *Stallings* v. *Summers*, Appeal No. 01964963, 2000 WL 366114 (EEOC Apr. 3, 2000); *Cobb* v. *Summers*, Appeal No. 01965074, 2000 WL 366115 (EEOC Apr. 3, 2000).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2001